STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

Petition for Investigation into the Regulatory	)	
Status of IP Enabled Voice Telecommunications	)	**DT 09-044**
Service	)	

BRIEF OF TWC DIGITAL PHONE LLC

January 15, 2010

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BRIEF OF TWC DIGITAL PHONE LLC

Pursuant to the Commission's July 2, 2009 letter, TWC Digital Phone LLC ("TWCDP") respectfully submits its initial brief in the above-referenced docket, addressing the proper regulatory classification and treatment of voice-over-Internet-Protocol ("VoIP") service.

INTRODUCTION AND SUMMARY

1. TWCDP's Interconnected VoIP Services

TWCDP provides two facilities-based, VoIP services in New Hampshire—"Digital Phone" for residential customers, and "Business Class Phone" for business customers.[1] These services are "interconnected VoIP services" as defined by the Federal Communications Commission ("FCC"), because they: (i) enable real-time, two-way voice communications, (ii) require use of a broadband connection, (iii) use IP-compatible customer premises equipment, and (iv) permit users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.[2] TWCDP's interconnected VoIP services offer a competitive, facilities-based alternative to the traditional

[1] Joint Prefiled Testimony of James Medica and Julie Laine on Behalf of TWC Digital Phone LLC, DT 09-044, at 3 (Oct. 9, 2009) ("Medica/Laine Testimony"). While this Brief generally focuses on Digital Phone for purposes of convenience, the legal analysis applies equally to TWCDP's Business Class Phone service.

[2] 47 C.F.R. § 9.3; Medica/Laine Testimony at 3-5 (describing TWCDP's interconnected VoIP services); TWC Digital Phone LLC Responses to NHTA First Set of Data Requests Approved by Staff, Nos. 1-1, 1-3, 1-4, 1-5 (Aug. 21, 2009) ("TWCDP Response to Staff Request"). All of TWCDP's discovery responses have been filed in the record in this proceeding. *See* Letter from Harry N. Malone to Debra A. Howland, Executive Director, New Hampshire Public Utilities Commission, DT 09-044 (Jan. 6, 2010).

landline telephone services that for many years represented the only service option for consumers.[3]

In connection with these services, TWCDP operates in a manner consistent with the regulations that apply to competitive local exchange carriers ("CLECs") in New Hampshire—including payment of all applicable fees and assessments—despite the federal preemption of state jurisdiction over VoIP services.[4] TWCDP also complies with the numerous federal requirements applicable to interconnected VoIP.[5] Finally, TWCDP complies with state and federal consumer protection requirements relating to slamming, billing, and customer complaints, among other things.[6]

In order to transmit its interconnected VoIP services to the public switched telephone network ("PSTN"), TWCDP must obtain wholesale telecommunications from a telecommunications carrier. In New Hampshire, TWCDP obtains those wholesale telecommunications from its affiliate, TWC Communications LLC, which in turn purchases wholesale telecommunications service from CRC Communications of Maine, Inc. ("CRC").[7] CRC is a "public utility" under New Hampshire law.[8]

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[3] Medica/Laine Testimony at 3.

[4] *See id.* at 12-13 (noting that TWCDP collects and remits the communications services tax under New Hampshire R.S.A. 82-A and contributes to the New Hampshire TRS fund, and that TWCDP's affiliate, Time Warner Cable Information Services (New Hampshire), LLC ("TWCIS") pays the utility assessment under New Hampshire R.S.A. 363-A based on the retail revenue of TWCDP and on any revenues that TWCIS itself may have); Prefiled Reply Testimony of Julie Laine on Behalf of TWC Digital Phone LLC, DT 09-044, at 11 (Dec. 4, 2009) ("Laine Reply Testimony"); *see also* TWCDP Response to Staff Request Nos. 1-31, 1-32.

[5] Medica/Laine Testimony at 12.

[6] *See id.* at 13.

[7] *See id.* at 6-7 (noting that in addition to providing transport to and from the PSTN and transporting and terminating local calls on behalf of TWCDP, CRC assists TWCDP in establishing E911-related connectivity and providing E911 services; performing local number portability; administering, paying, and collecting intercarrier compensation; transporting and terminating long-distance traffic; obtaining and administering numbering resources; and providing operator services, directory assistance, and directory listings); TWCDP Response to Staff Request No. 1-12. Such wholesale arrangements are common and have been consistently endorsed by regulators. *See, e.g., Time Warner*

2. NHTA Petition and the Commission's Inquiry

The Commission commenced this proceeding in response to a petition filed on March 6, 2009 by the New Hampshire Telephone Association ("NHTA") on behalf of its members, who are rural incumbent local exchange carriers.[9] The petition seeks "an independent inquiry into the appropriate regulatory status of IP enabled voice telecommunications service in New Hampshire."[10] Although the petition generally focused on a voice-based service offered by affiliates of Comcast Corporation (collectively, "Comcast"), the Commission observed at the outset that it more broadly raised issues "related to whether fixed voice over internet protocol (VoIP) in general . . . constitutes conveyance of a telephone message" within the meaning of state law, and also presents the question of "the extent to which federal law preempts New Hampshire law with regard to VoIP service."[11] Accordingly, TWCDP sought and was permitted to intervene as a party.[12]

NHTA has argued in this proceeding that providers of interconnected VoIP service should be considered "public utilities" under state law that must obtain permission to provide

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Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order, 22 FCC Rcd 3513 ¶¶ 8, 13 (WCB 2007) (reaffirming that "telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs . . . for the purpose of providing wholesale telecommunications services" to VoIP providers, and observing that such arrangements promote "wholesale telecommunications and facilities-based VoIP competition" as well as broadband deployment, an outcome that "holds particular promise for consumers in rural areas"); *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 52 (2005) (stating that interconnected VoIP providers "often enlist a competitive LEC partner in order to obtain interconnection to the Wireline E911 Network") (citation omitted).

[8] R.S.A. 362:2.

[9] Petition by the Rural Carriers of the New Hampshire Telephone Association, DT 09-044, at 1 (Mar. 6, 2009) ("NHTA Pet.").

[10] *Id.* at 1.

[11] Order of Notice, DT 09-044, at 1-2 (N.H. Pub. Utils. Comm'n May 6, 2009).

[12] TWC Digital Phone LLC Petition to Intervene, DT 09-044 (June 18, 2009); Transcript of Prehearing Conference, DT 09-044, at 8 (June 24, 2009) (granting all motions to intervene).

service in the state, and that the Commission is not preempted from subjecting them to such entry regulation. For all of the reasons set forth below, NHTA is wrong on both counts. First, both the New Hampshire Legislature and Supreme Court have made clear that the statutory definition of a "public utility" is to be construed narrowly; indeed, each has declined to interpret the term to encompass new technologies and services and thus rejected efforts to expand the Commission's jurisdiction as NHTA proposes here. In particular, the New Hampshire Supreme Court has specifically rejected the notion that the mere transmission of a message using a telephone—which appears to be one of NHTA's core arguments—triggers the application of public utility definition, particularly when that outcome would limit competition.[13]

In light of this clear legislative intent, the Commission should continue to adhere to an interpretation that restricts the definition of a "public utility" to providers of traditional circuit-switched offerings. That approach is not only more faithful to legislative intent, but it avoids a needless conflict with federal law. Under binding federal precedent, any attempt to impose certification, tariffing, or related requirements on interconnected VoIP services would be subject to preemption. In its *Vonage Order*, the FCC established that VoIP services sharing certain basic characteristics cannot be subject to state "economic regulation."[14]

The record in this proceeding establishes that Digital Phone is precisely the type of VoIP service for which the FCC intended to preempt state certification and other public utility requirements. As the FCC explained, permitting such regulation at the state level would subject VoIP providers to a patchwork of disparate requirements, creating a direct conflict with the strong federal policy favoring open entry for providers of new and innovative services such as

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[13] *See infra* at 7-8.

[14] *See Vonage Holdings Corp.; Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

VoIP. The U.S. Court of Appeals for the Eighth Circuit upheld the *Vonage Order*, confirming the FCC's ability to preempt state-imposed VoIP regulations to the extent they might undermine the federal interest in promoting competition and deregulation.[15] Moreover, classifying TWCDP as a "public utility" independently risks a conflict with the FCC's potential classification of VoIP as an information service.

Accordingly, any Commission decision that TWCDP is a public utility under New Hampshire law would precipitate further proceedings that would likely result in the invalidation of such a classification. Particularly because TWCDP already operates in a manner consistent with the state requirements applicable to CLECs—and did so long before this proceeding was initiated—the Commission should avoid creating a needless conflict with federal law.[16]

ARGUMENT

I. TWCDP CANNOT REASONABLY BE CLASSIFIED AS A "PUBLIC UTILITY" UNDER STATE LAW.

Whether TWCDP must seek Commission permission to provide Digital Phone hinges in the first instance on whether TWCDP can be deemed a "public utility" under New Hampshire law.[17] A "public utility" includes a corporation that "own[s], operat[es] or manag[es] any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages."[18] NHTA has stated that an interconnected VoIP service such as Digital Phone involves the

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[15] *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[16] *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002) (endorsing the FCC's decision to "dodge hard questions when easier ones are dispositive").

[17] R.S.A. 374:22 (providing that no entity "shall commence business as a public utility . . . without first having obtained the permission and approval of the Commission").

[18] R.S.A. 362:2.

conveyance of telephone messages, such that TWCDP is a "public utility" subject to the Commission's jurisdiction.[19]

The question of whether a particular entity is a public utility "is not a constitutional one nor one of public policy but rather one of statutory interpretation."[20] Elaborating on the point, the New Hampshire Supreme Court has emphasized that the public utility definition "does not apply to industries that the legislature did not intend to be regulated."[21] Thus, absent proof of such legislative intent, an entity cannot be found to fall within the Commission's jurisdiction—even if its activities fall within "the literal words of the statute."[22]

There is no plausible argument that the Legislature intended for the Commission to regulate interconnected VoIP providers as public utilities. The statutory provision defining a public utility was first enacted in 1911,[23] many decades before the emergence of VoIP and the Internet. Thus, for most of its existence, the public utility definition was a product of the monopoly telephone era. As new technologies and services have emerged, the Legislature has had numerous opportunities to amend the statute to expand the Commission's jurisdictional reach—and it has consistently declined to do so. Most analogous to this case, in 1977, the legislature rejected a proposed bill that would have regulated "all mobile telephone service

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[19] *See* Prefiled Direct Testimony of Douglas Meredith on Behalf of the New Hampshire Telephone Association, DT 09-044, at 11-12 (Oct. 9, 2009) ("Meredith Testimony").

[20] *Allied New Hampshire Gas Co. v. Tri-State Gas & Supply Co.*, 107 N.H. 306, 308, 221 A.2d 251, 253 (1966) (internal quotation marks and citation omitted).

[21] *Appeal of Atlantic Connections, Ltd.*, 135 N.H. 510, 514, 608 A.2d 861, 865 (1992).

[22] *Allied New Hampshire Gas Co.*, 107 N.H. at 305, 221 A.2d at 251 (ruling that a distributor of liquefied petroleum gas was not a public utility—defined to include entities involved in the "furnishing of light, heat, [or] power"—based on its finding that although this "language, in isolation, is broad enough to include" entities that distribute liquefied petroleum gas, the Commission "has never regulated such activities").

[23] *Re Zimmerman*, 80 N.H. P.U.C. 180 (Mar. 28, 1995).

companies and radio paging service companies" as public utilities.[24] That the Legislature considered it necessary to amend the statute to account for such entities demonstrates, in and of itself, that the statute was never intended to encompass any service that happens to involve the use of a telephone. The Legislature eliminated any doubt on the matter by expressly declining to enact that proposal, determining that the legislation "might stifle competition in a budding new industry."[25]

Relying on that history, the Supreme Court reversed a subsequent effort by the Commission to expand its jurisdiction to encompass radio paging companies. Of particular relevance here, the court stated unequivocally that the Legislature "did not intend to place all companies and businesses somehow related to . . . telephone . . . companies under the umbrella of the PUC's regulatory power."[26] The court also determined that permitting the Commission to exercise jurisdiction over radio paging companies would conflict with the State's strong policy—established in the state constitution among other places—to promote free trade and private enterprise. In fact, the court went so far as to conclude that the Commission, "by attempting to regulate radio pagers, is demonstrating the very behavior it was established to prevent: interference and disruption of free market private enterprise."[27] Finally, the court stated that there was "[n]o need" for the Commission to regulate radio paging services, because (1) the Commission already "regulat[es] telephone lines," such that the "radio-paging industry is not

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[24] N.H.S. Jour. 1854 (1977).

[25] N.H.H.R. Jour. 1069 (1977).

[26] *Appeal of Omni Communications, Inc. d/b/a Page Call (New Hampshire Public Utilities Commission)*, 122 N.H. 860, 863, 451 A.2d 1289, 1291 (1982) (ruling that radio paging companies were not covered by public utility definition).

[27] *Id.* at 863, 451 A.2d at 1291.

totally unregulated," and (2) the FCC "has regulatory power over" such entities.[28] For all of these reasons, the court concluded that the Legislature did not intend to grant the Commission authority over radio paging companies.[29]

That reasoning applies equally to this case. The above precedent establishes that the public utility definition does not apply merely because a service may involve the use of a telephone—foreclosing what appears to be one of NHTA's primary arguments.[30] NHTA's reading to the contrary would result in a dramatic expansion of the Commission's authority to regulate entry by any providers using new technologies to offer valuable services to New Hampshire consumers, simply because they involve the use of a telephone. Under that theory, the term "public utility" could be read to encompass a wide range of services that concededly are not subject to the Commission's jurisdiction—for example, nomadic VoIP services, voice-based services that permit only one-way communications, and potentially other communications functions such as in-home intercoms. It is well established that statutes should be construed to avoid such absurd results.[31]

In any event, it is far from clear that interconnected VoIP falls within the literal language of the statute. The reference to a "telephone . . . message" in the definition suggests that the use of a telephone is the operative fact in the analysis. But VoIP services do not permit the transmission of communications by telephone alone. Rather, as discussed below, VoIP services

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[28] *Id.* at 864, 451 A.2d at 1291.

[29] *Id.* at 864, 451 A.2d at 1291-92.

[30] Meredith Testitmony at 11-12 (asserting similarity between VoIP and the conveyance of a "telephone message"); *see also* Prefiled Direct Testimony of Valerie Wimer on Behalf of the New Hampshire Telephone Association, DT 09-044, at 22-23, 24 (Oct. 9, 2009) ("Wimer Testimony").

[31] *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (holding that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available") (citations omitted).

such as Digital Phone *also* require a broadband connection and specialized IP-compatible customer premises equipment ("CPE"). And as TWCDP has explained, the key piece of equipment for its service is not a telephone, but the specialized CPE—specifically, the embedded multimedia terminal adapter (or "eMTA")—that converts the user's communications to IP format for transmission over broadband facilities (or vice versa) and without which the telephone would be useless.[32] In other words, deeming a VoIP communication to be a "telephone message" is incomplete if not inaccurate. And it cannot matter whether such a communication is "comparable" to a traditional telephone message as NHTA has suggested.[33] Indeed, were that sufficient, the Commission would have been free to regulate mobile telephone services, which the legislature and supreme court have confirmed it cannot do.

NHTA has asserted that, notwithstanding this precedent, regulating TWCDP as a public utility would be in the public interest.[34] But the case law forecloses that argument as well. As noted above, the potential classification of a particular entity as a public utility is a question of statutory interpretation, not one of public policy. Thus, the New Hampshire Supreme Court has rejected classification arguments based on public interest considerations where there is "no clear legislative mandate."[35] In any event, even if such considerations were relevant, the outcome NHTA seeks would actually *disserve* the public interest. As was the case with the prior efforts to expand the Commission's jurisdiction discussed above, subjecting interconnected VoIP to state

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[32] Medica/Laine Testimony at 4; Laine Reply Testimony at 7.

[33] Meredith Testimony at 11.

[34] *Id.* at 12; Prefiled Reply Testimony of Douglas Meredith and Valerie Wimer on Behalf of the New Hampshire Telephone Association, DT 09-044, at 2-3 (Dec. 4, 2009) ("Meredith/Wimer Reply Testimony").

[35] *Manchester Water Works*, 103 N.H. 505, 507, 175 A.2d 525, 527 (1961) (stating that "[i]t may be that the public interest would best be served if the Public Utilities Commission had full control" of a particular entity as a public utility, but declining to effectuate that result where "there is no clear legislative mandate to that effect expressed in the statutes").

regulation may erect barriers to entry and impede the development of competition. The law is clear that "legislative grants of authority to the PUC should be interpreted in a manner consistent with the State's constitutional directive favoring free enterprise."[36] Regulating interconnected VoIP as NHTA demands would run counter to that firm mandate. The same concern underlies federal policy, which, as discussed below, is why the FCC preempted state entry regulation of VoIP.

Further, there are no public interest harms that would result if TWCDP is not classified as a public utility. As a non-dominant provider, TWCDP lacks market power. In addition, as noted, TWCDP complies with various federal requirements applicable to interconnected VoIP, and operates in a manner consistent with state CLEC regulations. And since *interconnected* VoIP services such as Digital Phone rely on regulated telecommunications carriers to exchange traffic with the PSTN, the Commission has jurisdiction over those conventional connections, as it did in the context of radio paging companies discussed above.[37] Thus, there is no need for the Commission to again run afoul of legislative intent, as the interests of New Hampshire consumers are already protected.

For these reasons, TWCDP cannot reasonably be understood to fall within the statutory definition of a "public utility," and it thus cannot be required to seek certification as a condition on its provision of service in New Hampshire.

II. FEDERAL LAW PREEMPTS STATE AUTHORITY OVER VOIP SERVICES SUCH AS DIGITAL PHONE AND BUSINESS CLASS PHONE.

Even if TWCDP could be classified as a "public utility" under New Hampshire law, federal law precludes the Commission from subjecting TWCDP to certification, tariffing, or

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[36] *Appeal of Public Service. Co. of New Hampshire*, 141 N.H. 13, 676 A.2d 101 (1996).

[37] *Omni Communications*, 122 N.H. at 864, 451 A.2d at 1291

other public utility requirements in connection with that service. The FCC's *Vonage Order* established that VoIP services sharing certain basic characteristics are not subject to regulation by state public utility commissions.[38] The FCC has specifically confirmed that these services include fixed, facilities-based services provided by cable operators.[39] While the FCC observed that "states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices . . . and generally responding to consumer inquiries and complaints,"[40] it sought to establish a uniform national regulatory framework free from "economic regulations."[41] Indeed, the FCC's overarching goal was to avoid "patchwork regulation" of VoIP services, under which regional and national providers finally challenging incumbent LECs' entrenched dominance would "have to satisfy the requirements of more than 50 jurisdictions with more than 50 different sets of regulatory obligations."[42]

A. The *Vonage Order* Broadly Preempted State Authority to Impose Certification, Tariffing, and Related Public Utility Requirements on VoIP Services Such as Digital Phone.

At issue in the *Vonage* proceeding was an order of the Minnesota Public Utilities Commission that required Vonage to comply with traditional state telephone regulations, including certification and tariffing requirements.[43] The FCC began its analysis by noting that Vonage's service enabled intrastate communications, in addition to interstate communications,

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[38] *See Vonage Order* ¶ 1.

[39] *See infra* at 14.

[40] *Vonage Order* ¶ 1.

[41] *Id.* ¶ 36. In the wake of the *Vonage Order*, the FCC issued a series of orders in its *IP-Enabled Services* proceeding to define that national framework, requiring interconnected VoIP providers to comply with CALEA, provide E911 connectivity, contribute to universal service, protect CPNI, provide telecommunications relay services, and comply with local number portability requirements, among other things.

[42] *Id.* ¶¶ 32, 41.

[43] *Id.* ¶ 10.

making it a "mixed use" service.[44] The Commission then relied on its "authority to preempt state regulation that would thwart or impede the lawful exercise of federal authority over the interstate component of the communications."[45] Sometimes confusingly called the "impossibility" doctrine, this principle is *not* concerned with whether it is possible to determine the physical end points of a call carried by a service like Vonage's DigitalVoice offering; rather, the relevant question is whether it is possible for federal and state regulation to coexist with respect to a jurisdictionally mixed service without impermissibly interfering with legitimate federal interests.

Applying that standard, the FCC concluded that state utility regulation of Vonage's service would directly conflict with—and prevent the lawful exercise of—federal policy. It emphasized that such regulation was preempted "irrespective of the definitional classification" of the service, which the FCC expressly declined to decide.[46] Regardless of that classification issue, the FCC explained that it maintains an open entry policy for non-dominant providers that would be undermined by the imposition of certification and tariffing requirements.[47] The FCC cited its prior determination that "entry requirements could stifle new and innovative services whereas blanket entry authority, *i.e.*, unconditional entry, would promote competition."[48] Indeed, applying for a certificate "can take months and result in denial of a certificate, thus preventing entry altogether."[49] Similarly, state requirements to file tariffs for VoIP services

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[44] *Id.* ¶ 18.

[45] *Id.* ¶ 19; *see also id.* (noting that preemption is appropriate where "state regulation would negate[] the exercise by the FCC of its own lawful authority") (quoting *Public Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990)) (internal quotation marks omitted) (brackets in original).

[46] *Vonage Order* ¶ 14.

[47] *Id.* ¶¶ 20-21.

[48] *Id.* ¶ 20.

[49] *Id.*

would fly in the face of the FCC's determination that "*prohibiting* such tariffs would promote competition and the public interest."[50]

If federal and state regulators could establish distinct rules for the intrastate and interstate components of VoIP services without precipitating any conflict, preemption would be unnecessary. But where, as here, services combine local and long distance capabilities, entry regulations necessarily affect a provider's ability to introduce interstate services, as well as intrastate services. The FCC further recognized that regulating the intrastate component of VoIP services would necessarily encroach on the FCC's exclusive jurisdiction over interstate services because of the "inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[51] Such VoIP features entail communication with servers located in multiple states; indeed, "[t]hese functionalities in all their combinations form an integrated communications service designed to overcome geography, not track it."[52]

Critically for purposes of this proceeding, the FCC made clear that its preemption analysis applied not only to Vonage's service, but to *any* VoIP service that possesses three basic characteristics: (1) a requirement for a broadband connection from the user's location; (2) a need for IP-compatible CPE; and (3) a service offering that includes a suite of integrated capabilities and features, able to be invoked sequentially or simultaneously, that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice

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[50] *Id.* (emphasis added).

[51] *Id.* ¶ 25.

[52] *Id.*

communications and access other features and capabilities, even video.[53] Whether a VoIP service is "functionally similar to traditional local exchange and long distance voice service" is beside the point; indeed, that focus "completely ignore[s] the considerations that dictate preemption."[54] Even assuming they provide many similar functionalities as compared to traditional telephone services, VoIP services like Vonage's DigitalVoice or TWCDP's Digital Phone and Business Class Phone cannot be regulated by state commissions without "'negating' federal policy and rules."[55]

Although NHTA has tried to avoid this precedent with the erroneous claim that the *Vonage Order* is limited to "nomadic" VoIP services,[56] the FCC has never limited its preemption rationale in this way. To the contrary, the FCC expressly recognized that, under this three-part standard, facilities-based VoIP services—including cable VoIP services such as Digital Phone—are subject to preemption. For example, the FCC stated that "[t]o the extent other entities, *such as cable companies*, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order."[57] And, to remove any conceivable doubt, Commissioner Abernathy emphasized the Commission's intention to make clear that "all VoIP services that integrate voice communications capabilities with enhanced features and entail the

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[53] *Id.* ¶ 32. As discussed in detail below, the record in this proceeding makes clear that TWCDP's Digital Phone service satisfies this test. *See infra* Section II.B.

[54] *Id.* ¶ 22.

[55] *Id.* ¶ 23 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 368 (1986)).

[56] Meredith Testimony at 8-9; Meredith/Wimer Reply Testimony at 3-5.

[57] *Vonage Order* ¶ 32 (emphasis added); *see also id.* ¶ 32 n.113 (describing cable VoIP offerings, including Time Warner Cable's, as examples of services that qualify for preemption); *id.* ¶ 46 (reaffirming that cable VoIP services are subject to preemption "to an extent comparable to what we have done in this Order").

interstate routing of packets—whether provided by application service providers, cable operators, LECs, or others—will not be subject to state utility regulation."[58]

The Minnesota Commission appealed the *Vonage Order* to the U.S. Court of Appeals for the Eighth Circuit, with the support of NARUC and some individual state commissions. The court affirmed the FCC's preemption ruling.[59] The court upheld the FCC's analysis with respect to Vonage's DigitalVoice service, relying in part on the practical difficulties of determining the location of end users in the nomadic VoIP context.[60] But the court went one step further, concluding that the FCC properly considered "the conflicts between state regulation and federal *policy*," and, in turn, that "competition and deregulation are valid federal interests that the FCC may protect through preemption of state regulation."[61] More specifically, the FCC's concerns that certification and tariffing requirements might harm consumers and impede competition were entitled to deference, especially because the FCC "has a thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements."[62]

While that analysis strongly supports the FCC's broad interest of avoiding a patchwork of state regulation, the court did not reach the specific question whether non-nomadic, facilities-based VoIP services were properly subject to preemption. Although the FCC had clearly stated its *intention* to preempt regulation of such services, the Minnesota regulation at issue did not

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[58] *Id.*, Separate Statement of Commissioner Kathleen Q. Abernathy.

[59] *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[60] *Id.* at 579.

[61] *Id.* at 580 (emphasis added).

[62] *Id.* (brackets in original, internal quotation marks and citation omitted).

focus on fixed VoIP services *per se*, thereby depriving the court of a live case or controversy.[63] Nevertheless, there can be no question that the FCC included fixed VoIP offerings such as Digital Phone within the class of services that it said *should* be fenced off from state economic regulation.[64] The FCC relied heavily on "the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously."[65] As the FCC further explained, "these integrated capabilities and features are not unique to [Vonage's] DigitalVoice, but are inherent features of most, if not all, IP-based services having basic characteristics found in DigitalVoice, including those offered or planned by facilities-based providers."[66] And, in its Eighth Circuit brief, the FCC emphasized that fixed VoIP providers, just like Vonage—but *unlike* traditional circuit-switched providers—enable subscribers to "perform simultaneously multiple communications tasks during a single VoIP session, and may transmit packets consisting of interstate and intrastate communications that are intertwined and inseverable."[67]

Moreover, the federal policy interests that warranted preemption in the *Vonage Order* apply to all VoIP services, irrespective of whether they include any nomadic capabilities. As noted above, the FCC held that state certification and tariffing requirements "directly conflict[] with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing,

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[63] *Id.* at 582-83.

[64] *See Vonage Order* ¶¶ 32 & n.113, 46.

[65] *Id.* ¶ 25.

[66] *Id.* ¶ 25 n.93.

[67] Br. for Respondents, *Minn. Pub. Utils. Comm'n v. FCC*, No. 05-1069, at 64 (8th Cir. filed Dec. 1, 2005) (internal quotation marks omitted).

and other requirements arising from these regulations for services such as DigitalVoice."[68] And, once again, the FCC explicitly recognized that this analysis applies equally to "VoIP services" provided by "cable companies."[69] Because the FCC has made clear its view that cable VoIP services like Digital Phone may not be subject to certification, tariffing, or related public utility requirements, any attempt to impose such obligations would thwart federal policy and violate the Supremacy Clause of the Constitution.[70] It is hornbook law that federal administrative agencies have "broad discretion to announce policy in adjudication,"[71] and such pronouncements of policy are binding even when they are not necessary to resolve the matter pending before the agency.[72]

Finally, nothing in the FCC's *2006 USF Order* has any bearing on the preemption analysis set forth herein. That order observed in *dicta* that VoIP providers that choose to make universal service contributions on the basis of their actual interstate revenues could become subject to state regulation.[73] As explained above, however, whether or not the jurisdictional end points of calls made using Digital Phone can be identified has no bearing on the preemption analysis relating to entry regulation; rather, preemption results from the irreconcilable conflict between the FCC's deregulatory policies and state certification and tariffing requirements.

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[68] *Vonage Order* ¶ 20.

[69] *Id.* ¶ 46.

[70] *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks omitted).

[71] *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (internal quotation marks omitted).

[72] *See, e.g., Kidd Communications v. FCC*, 427 F.3d 1, 5 (D.C. Cir. 2005) ("An administrative agency can, of course, make legal-policy through rulemaking or by adjudication. When an agency does so by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations. Thus, even were the Commission's discussions . . . dicta, they still presumably would reflect Commission policy.").

[73] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 ¶ 56 (2006) ("*2006 USF Order*").

Because the FCC's *2006 USF Order* does not purport to modify the federal policies at stake, its *dicta*—which is unsupported by *any* analysis or evidence—cannot be read to alter the clear and rigorous analysis of the *Vonage Order*.[74]

Rather, the *2006 USF Order* was solely concerned with the narrow issue of potential state jurisdiction relating to universal service contribution issues. Specifically, the *2006 USF Order* suggests that *some* non-nomadic VoIP providers that *choose* to rely on actual revenues for purposes of calculating federal universal service contributions might not qualify for preemption in this fashion. As the plain language of that order indicates, while VoIP providers "may" rely on actual revenues, they are not compelled to do so, and it is only "under this alternative" that the *Vonage Order* might be rendered inapplicable.[75] Notably, when the New York Public Service Commission suggested to the Eighth Circuit that the *2006 USF Order* undercut the case for preemption, the FCC took pains to file a letter with the court emphatically rejecting that contention.[76] As the FCC explained, the possibility that some VoIP providers would contribute to USF based on their actual revenues has no bearing on the FCC's preemption of state regulation with respect to other VoIP providers. Importantly, TWCDP contributes to USF on the basis of traffic studies,[77] making the *2006 USF Order* dicta irrelevant.

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[74] *See, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . ."); *see also Motor Veh. Manuf. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

[75] *2006 USF Order* ¶ 56 ("Alternatively, to the extent that an interconnected VoIP provider develops the capability to track the jurisdictional confines of customer calls, it *may* calculate its universal service contributions based on its actual percentage of interstate calls. *Under this alternative*, however, we note that an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation.") (emphasis added).

[76] *See* Letter of Nandan M. Joshi to Michael E. Gans, *Minnesota Public Utils. Comm'n v. FCC*, Nos. 05-1069 *et al.* (filed July 11, 2006).

[77] TWC Digital Phone LLC Responses to First Set of Data Requests by NHTA, No. 1-12 (Nov. 6, 2009) ("TWCDP Response to NHTA Request").

B. The Record Before This Commission Confirms That Digital Phone Qualifies for Preemption Under the *Vonage Order*.

Just as the *Vonage Order* anticipated, the record before the Commission confirms that TWCDP's Digital Phone and Business Class Phone satisfy the criteria for preemption set forth by the FCC.[78]

1. Requirement of a Broadband Connection

As stated in TWCDP's discovery responses and testimony, Digital Phone and Business Class Phone customers must have a broadband connection with a minimum speed of 200 kilobits per second in order to use the service.[79] The customer does not require a subscription to an Internet access service to use the VoIP service, although such a service (regardless of who provides it) would allow the customer to access certain advanced features described below.[80] Nevertheless, a physical broadband connection between TWCDP's network and the subscriber premises is required for Digital Phone and Business Class Phone to operate. In fact, a single broadband connection can support several simultaneous voice sessions or other types of communications.[81]

2. Requirement of Specialized IP-Compatible CPE

TWCDP also has shown that its interconnected VoIP customers must have specialized IP-compatible equipment installed at their premises in order to access the service.[82] In the *Vonage Order*, the FCC found that the particular type of equipment required for Digital Phone—

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[78] *See supra* at 13 (citing *Vonage Order* ¶ 32); *see also* Laine Reply Testimony at 7-8.

[79] Medica/Laine Testimony at 4; TWCDP Response to Staff Request No. 1-3. The FCC historically has defined "broadband" as being capable of speeds of at least 200 kbps. *See, e.g., Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340 ¶ 14 (2004).

[80] Medica/Laine Testimony at 5; TWCDP Response to Staff Request No. 1-3.

[81] Medica/Laine Testimony at 6.

[82] *Id.* at 4-5; TWCDP Response to Staff Request Nos. 1-2, 1-5.

an embedded multimedia terminal adapter or "eMTA"—satisfies this prong of the preemption analysis.[83]

NHTA has noted that TWCDP customers do not purchase the eMTA.[84] To the extent this fact is offered to suggest that the eMTA does not satisfy the first prong of the FCC's preemption test, it is irrelevant to the analysis. The Communications Act of 1934, as amended by the Telecommunications Act of 1996, defines "customer premises equipment" as "equipment employed on the premises of a person."[85] In the *Vonage Order*, the FCC did not in any way rely on the actual ownership of the specialized IP-compatible device. Thus, the fact that the customer may not *own* the equipment does not mean that the equipment is not "customer premises equipment." What matters is where the device is located—*i.e.*, at the customer premises.

3. Suite of Integrated Capabilities and Features

Finally, as described in its testimony and discovery responses, TWCDP's interconnected VoIP services offer a suite of integrated capabilities and features that can be invoked sequentially or simultaneously and that allows customers to manage personal communications dynamically, including by originating and receiving voice communications and access other features and capabilities.[86] NHTA has conceded this point in its testimony, stating that the interconnected VoIP services offered by TWCDP (as well as Comcast) "have features that allow the customer to manage their calls dynamically."[87]

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[83] *Vonage Order* ¶ 6 & n.16.

[84] Wimer Testimony at 9.

[85] 47 U.S.C. § 153(14).

[86] Medica/Laine Testimony at 7; TWCDP Response to Staff Request No. 1-38.

[87] Wimer Testimony at 4.

TWCDP has explained that its customers can—or, during the first quarter of 2010, will be able—to: (i) access voicemail and forward digitized voice messages to any e-mail; (ii) route Caller ID information through their personal computer or television, and receive notifications of incoming calls through Instant Messages or on television screens; (iii) enable, disable, and customize voice and video features over the Internet; (iv) enable distinctive rings for different callers; and (v) establish "rules" for the selective handling of incoming calls.[88] More specifically, TWCDP customers can or soon will be able to use a residential web portal to manage their voicemails as well as call features, and to receive call notifications through Instant Messages.[89] In addition, TWCDP's CallerID 1.0 allows customers to receive call notifications through their television, while CallerID 2.0 will provide them with the ability to initiate calls from the television, manage and listen to voicemails via the television, and forward incoming calls to voicemail via the television.[90] Furthermore, TWCDP's customers can use a single broadband connection to maintain multiple voice sessions simultaneously, and may utilize multiple service features that access different IP addresses during a single communications session and perform different types of communications over the TWCDP broadband network simultaneously.[91] These functions are very similar to those that the FCC addressed in the *Vonage Order*.[92] TWCDP has explained that these features and capabilities are made possible by IP technology, which allows a TWCDP interconnected VoIP customer to perform different types of communications and access multiple IP addresses (for example, the IP address

[88] Medica/Laine Testimony at 7-8; TWCDP Response to Staff Request No. 1-38; TWCDP Response to NHTA Request No. 1-7 (noting that these capabilities are available or will be available in the first quarter of 2010).

[89] Medica/Laine Testimony at 7-8.

[90] *Id.* at 8.

[91] *Id.*

[92] *Vonage Order* ¶ 7.

associated with the eMTA, a personal computer, a server that stores information being accessed, etc.) simultaneously during a single communications session.[93]

In sum, TWCDP's submissions in the record establish that Digital Phone and Business Class Phone satisfy the criteria set forth in the *Vonage Order*, such that any public utility regulation of TWCDP's interconnected VoIP services would be preempted under federal law.

C. Regulating TWCDP as a "Public Utility" Also Would Usurp the FCC's Prerogative to Classify Interconnected VoIP Services.

Finally, in addition to triggering preemption under the *Vonage Order*, classifying TWCDP as a public utility—and deeming its interconnected VoIP services to involve the conveyance of a telephone message—would risk a conflict with the FCC's prerogative to classify interconnected VoIP services. In its *IP-Enabled Services* proceeding, the FCC has imposed a series of discrete requirements on interconnected VoIP providers but consistently refrained from resolving the appropriate statutory classification of interconnected VoIP services.[94] Instead of relying on the default non-regulation of information services, or the fully panoply of Title II regulations applicable to telecommunications services, the FCC has constructed a narrowly tailored regime to achieve particular policy goals.[95] The FCC has asserted exclusive authority to determine both how and when to act in order to achieve a delicate balance between competing interests in fashioning a regulatory scheme for VoIP services.[96] That

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[93] Medica Laine Testimony at 6.

[94] In this regard, the letter recently submitted by the Office of Consumer Advocate is of no consequence, as it merely quotes the most recent instance in which the Commission noted that the regulatory classification remains an open question. *See* Letter from Rorie E.P. Hollenberg, Staff Attorney, Office of Consumer Advocate, to Debra A. Howland, Executive Director, New Hampshire Public Utilities Commission, DT 09-044 (Jan. 12, 2010).

[95] *See, e.g.*, *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶ 39 (1998) (declining to make any "definitive pronouncements" concerning the regulatory classification of VoIP); *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005), *aff'd*, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

[96] *See Vonage Order* ¶ 1.

approach has worked well for the industry and for consumers, and there is no need for the Commission to seek the imposition of additional state obligations on Digital Phone—particularly given that TWCDP operates consistent with state CLEC requirements.

Moreover, classifying TWCDP as a "public utility" that conveys "telephone messages" pursuant to New Hampshire law would conflict with the FCC's potential classification of VoIP as an information service. Notably, the FCC has proposed in a recent rulemaking to classify interconnected VoIP as an information service,[97] consistent with the findings of two federal district courts.[98] The FCC also maintains a "long-standing national policy of nonregulation of information services."[99] Indeed, the Eighth Circuit made clear that "any state regulation of an information service conflicts with the federal policy of nonregulation."[100] Accordingly, unless and until the FCC affirmatively rejects an information service classification for VoIP services like Digital Phone,[101] the imposition of utility regulations by this Commission would pose a significant risk of precipitating such a conflict, with the attendant costs of litigation that inevitably would follow. The far more prudent course would be to await a final classification

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[97] *High-Cost Universal Service Support, et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-337, *et al.*, App. A ¶ 209, App. C ¶ 204 (rel. Nov. 5, 2008).

[98] *See Southwestern Bell Tel., L.P. v. Mo. PSC*, 461 F. Supp. 2d 1055 (D. Mo. 2006) (holding that "IP-PSTN services are both 'enhanced services' and 'information services'" under federal precedent); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F Supp 2d 993, 1000 (D. Minn. 2003) (adopting information service classification because of protocol conversion performed for IP-PSTN calls).

[99] *Minn. Pub. Utils. Comm'n*, 483 F.3d at 580 (quoting *Vonage Order* ¶ 21). TWCDP would continue to comply with regulations that have been specifically extended to interconnected VoIP services, but an information service classification would preclude the automatic imposition of Title II regulation under federal law and preempt state utility regulation altogether.

[100] *Id.*

[101] In this regard, the letter from FCC staff that NHTA attached to its petition is immaterial. NHTA Pet. at 2-3 (citing Letter from Dana Shaffer and Matthew Berry, Federal Communications Commission, to Kathryn A. Zachem, Comcast, File No. EB-08-IH-1518 (Jan. 18, 2009)). The successors to that letter's authors subsequently confirmed (in a letter that has been submitted into the record of this proceeding) that the statutory classification of VoIP "remains an open question." Letter from Julie A. Veach and Michele Ellison, Federal Communications Commission, to Kathryn A. Zachem, Kathryn A. Zachem, Comcast, File No. EB-08-IH-1518, at 1 (Apr. 14, 2009).

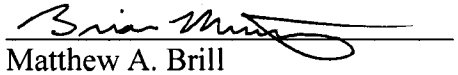
decision from the FCC. Because TWCDP operates consistent with the requirements applicable to CLECs in New Hampshire, any effort to classify it as a public utility would invite conflicts and costly diversions without any tangible benefits whatsoever.

CONCLUSION

For the foregoing reasons, the Commission should rule that TWCDP is not a "public utility" under New Hampshire law.

Respectfully submitted,

TWC DIGITAL PHONE LLC



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Dated: January 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January, 2010, a copy of the foregoing Brief of TWC Digital Phone LLC has been sent by electronic mail to persons listed on the Service List.

Brian Murray